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April 25, 2003

**VIA FACSIMILE AND
FIRST CLASS MAIL**

Ms. Gale Norton
Secretary of the Department of Interior
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C., 20040

Stephen M. Macfarlane, Esq.
Trial Attorney
U. S. Department of Justice
Environment and Natural Resources Division
501 I Street, Suite 9-700
Sacramento, CA 95814-2322

Re: Imperial Irrigation District v. United States, et al.
USDC, So. Dist. of Cal., Case No. 03-cv-0069

Dear Counsel and Secretary Norton:

In its April 17, 2003 Order Remanding Action in the above-referenced case, the Court remanded the matter to the Department of the Interior ("DOI") for *de novo* Part 417 proceedings consistent with the Court's March 18, 2003 order granting IID's motion for preliminary injunction. In addition, the Court vacated all prior DOI findings and conclusions previously rendered during its purported 2002 Part 417 review of IID's water use, and ordered that DOI "meticulously" follow the procedures required by law.

IID has serious concerns that the *de novo* Part 417 review process, including any recommendations and determinations thereunder, be undertaken in an objective and unbiased manner.¹ Further, IID seeks assurance that the *de novo* Part 417 process afford IID and other California users of Colorado River water due process before any determinations are made regarding their respective property rights to Colorado River water. We assume that the DOI intends to start the *de novo* Part 417 very soon, and thus IID requests your immediate response to these inquiries.

1. Persons to Conduct De Novo Part 417 Process

The previous Part 417 review of IID's water use for 2003 was undertaken through the Boulder City office of the Bureau of Reclamation ("BOR"), under the supervision of Regional Director Robert Johnson, and reviewed by the DOI through Assistant Secretary Bennett Raley,

¹ IID reserves all rights to challenge the validity of Part 417 and the Part 417 process, on its face and as applied.

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pursuant to the Secretary's delegation of authority. Mr. Johnson and Mr. Raley, along with IID, MWD, CVWD and the State of California, have also been directly and intimately involved in the ongoing negotiations to resolve a variety of disputes through the device of the Quantification Settlement Agreement ("QSA"), which process predates the litigation by many years. As a result of this past and continuing personal involvement in these matters and their efforts to encourage or force a resolution, IID believes that these individuals and their offices have developed opinions regarding IID's water use which they will not be able to disregard per the Court's order and conduct a truly objective and unbiased *de novo* review of IID's water use needs for 2003.

Also, given the dispute about bias raised as part of the IID v. U.S. litigation, IID believes it is of utmost importance for the DOI to demonstrate to IID, the other community of interests within the Colorado River watershed, and to the public at large, that every effort is being made to make this *de novo* Part 417 determination free from actual bias or even the *appearance* of bias. The declaration under oath from Boulder City Regional Director Robert Johnson as part of the IID v. U.S. litigation stated water use conclusions that he had already reached, despite the Department's reliance on the 1979 Decree. In regard to the issue of the amount of tailwater needed for farming in the IID geographical region with highly saline water, Mr. Johnson stated: "The tailwater described by Mr. Silva [IID's General Manager] is, however, unnecessary to successful cultivation, but instead is evidence of wasteful irrigation practices, . . ." Johnson Declaration, p. 12, II.2-5. In describing selective reports concerning IID's water use, Mr. Johnson stated: "The reports indicated to me that water was being wasted in the Imperial Valley." Johnson Declaration, p. 14, II.24-25.

These statements leave little doubt about the fact that Mr. Johnson personally reached conclusions about IID's water use without consulting with IID. Given the importance of this matter, and the attention that will be focused on this Part 417 proceeding by stakeholders and others within and outside of the Colorado River watershed, IID asserts that the Regional Director in Boulder City should not be the initial "neutral" decision-maker. Basic concepts of fairness and due process require that the Secretary reach out to other qualified people within the BOR, or elsewhere in the DOI, so that this determination can be free from accusations of prejudgment and bias. Accordingly, IID requests this matter be heard by another Regional Office or by a qualified Administrative Law Judge.

IID requests that the Secretary and the DOI exercise the asserted powers of delegation in these matters and refer the *de novo* Part 417 review of IID's water use, as well as the water use of the other California agencies, to another Regional Office of the BOR, such as Sacramento. In addition, we urge the Secretary to withdraw her delegation of authority for review and appeal of

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the BOR's determinations from Assistant Secretary Raley and either undertake those responsibilities herself, if she has not been personally involved to date, or refer the matter to an administrative judge in the DOI's Board of Land Appeals. These requests are reasonable, and are in accord with the Administrative Procedures Act ("APA").² Under 5 U.S.C. § 556 a presiding or participating employee may "disqualify himself." If such recusals do not voluntarily occur, we will prepare the affidavit specified in that section. Please advise us as soon as possible whether you will accommodate these reassignments.

2. Scope of De Novo Review and Participation

As testified under oath by Regional Director Robert Johnson, as well as by MWD and CVWD in the current IID v. U.S. litigation, the 2003 Colorado River water use of every California agency is interdependent on the use by the others. When there is unmet demand, as is the case in a "normal flow" year such as 2003, this interdependence is acute. Indeed, as Mr. Johnson testified in his sworn declaration (p. 20), "if the preliminary injunction is granted, Interior will be required to reconsider and revise the water order approvals issued to junior users, specifically those issued to CVWD and to MWD."

Furthermore, the bases for DOI's alleged "informal adjudication" of each California contract holder for its 2003 water order was on the derived water duties from the 1979 Decree.³ But, the 1979 Decree foundation for Part 417 determinations was expressly rejected by the Court in its Preliminary Injunction decision. Therefore, IID asserts that DOI must undertake a new Part 417 beneficial use analysis of not only IID's water use for 2003, but for every other California contract holder as well. Consistent with the requirements of due process and the process proposed by you for IID's Part 417 process, all California agencies should be allowed to participate in each other's Part 417 process since all have an interdependent property-right stake in the outcome of each process.

IID presumes that MWD and CVWD will actively participate in the review of IID's water use. IID must, therefore, be permitted to participate in the review of MWD's, CVWD's and the

² IID contends that any review of IID's water use entails more than APA standards, but at a bare minimum, APA standards must be complied with.

³ IID's December 27, 2002, letter directly referenced the 1979 Decree, as did the Bureau's "Fact Sheet" as to CVWD. Also, that "Fact Sheet" states: "With one minor exception, no other present perfected right holder in the Lower Colorado River Basin consumptively uses more water per acre than would be allowed under their present perfected right." Id.

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other California agencies' water use to assure fairness and to protect its contract and property rights.

IID recognizes that the Secretary and the Department of Justice personnel have been advised repeatedly by MWD and CVWD that IID wastes water. IID vigorously disputes such accusations and believes that it is MWD and CVWD who are wasteful. For example, IID firmly believes that CVWD's water use efficiencies are less than those of IID. IID also asserts that 50% of the water, or maybe more, delivered to MWD ends up in the Pacific Ocean after being used to water landscape. These facts are of critical importance when it comes to understanding the *true need* of the junior right holders who stand to benefit if IID is found to need less water than it has ordered. The ability of junior right holders to meet their own unmet demand by eliminating their own waste must be considered.

IID asserts that a *de novo* proceeding for the other contract holders under the Seven-Party Agreement is essential in order for the Secretary to *clearly show to all interested parties* that IID is not being unfairly singled out for unique treatment under the Part 417 rules. If as they say, what's good for the goose is good for the gander, it should be acceptable for MWD, CVWD and other users to be subject to the same "open book" analysis that IID will be subjected to. Indeed, in order to support whatever due process underpinnings support the Part 417 process, it is important to treat all of the users in the same fashion when, as noted by the Department of Justice and in Mr. Johnson's Declaration, the positions of the major users in Southern California are all interdependent.

IID believes the most efficient and speedy method of conducting these new reviews and analyses is through a consolidated Part 417 proceeding involving all of the affected parties. Please confirm that DOI will conduct new Part 417 beneficial use analyses of each California agencies' use of Colorado River water for 2003, not just IID's. Further, please confirm that a consolidated review process of all contractors' 2003 uses will be conducted.

Part 417 contains a non-exhaustive list of factors that are to be considered in evaluating a contractor's water use for the coming year:

The recommendations and determinations shall, with respect to each Contractor, be based upon but not necessarily limited to such factors as the area to be irrigated, climatic conditions, location, land classifications, the kinds of crops raised, cropping practices, the type of irrigation system in use, the condition of the water carriage and distribution facilities, record of water orders,

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and rejections of ordered water, general operating practices, the operating efficiencies and methods of irrigation of the water users, amount and rate of return flows to the river, municipal water requirements and the pertinent provisions of the Contractor's Boulder Canyon Project Act water delivery contract.

IID requests that DOI consider not only the factors expressly identified in Part 417, but additional factors that are pertinent, including factors to be considered under California state law to the extent not inconsistent with federal law. For example, under California law reasonable beneficial use determinations must take into consideration local custom, such as common irrigation practices, comparisons to other similarly situated water users, the costs of and risks of changing water-use methods and the environmental impacts of such changes. See, for example, Cal. Water Code § 100.5; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 547 (1935). Furthermore, the Part 417 factors were not in existence at contract formation or by the enactment date of the Boulder Canyon Project Act. Rather, general common-law principles of beneficial use were relevant and DOI's review should include such long-established principles.

IID believes that these are important considerations in the context of any reasonable beneficial use analysis. Also, IID asserts that it is important, even given the DOI's views regarding the scope of federal law, to give recognition and dignity to state law when it is not inconsistent with Part 417 or other aspects of federal law. As you know, the 4.4 maf apportionment is a sovereign and perpetual right of the State of California and, therefore, issues of importance to the State, as evidenced in relevant state law, should be given respect.

Please confirm that DOI will consider factors not expressly included in Part 417, and please identify any factors DOI has or will consider in connection with its evaluation of IID's and other California agencies' water use for 2003.

3. Procedures to Ensure Due Process

The law is clear that where agency determinations concern important property rights, such as water rights, certain procedural safeguards must be available to ensure due process. Madera Irr. Dist. v. Hancock, 985 F.2d 1397, 1401 (9th Cir. 1993); Greene v. Lujan, 1992 WL 533059 (W.D. Wash. 1992), aff'd Greene v. U.S., 996 F.2d 973 (9th Cir. 1993) and Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995). In Greene, the Ninth Circuit held that "due process generally includes an opportunity for some type of hearing before the deprivation of a protected property interest" and "in almost every setting where important decisions turn on questions of

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fact, due process requires an opportunity to confront and cross examine adverse witnesses."
(Emphasis added.)

DOI stated in its "Response To Supplemental Briefs On Remedy" (p.5) that DOI considers this Part 417 proceeding to be an "informal" adjudication under 5 U.S.C. § 555, and not a "formal" adjudication under 5 U.S.C. Part 554. IID asks that DOI refer to Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995), in which the Ninth Circuit held that even if the APA rules themselves do not necessitate a formal adjudication, where the lives of numerous people may be affected by an erroneous decision, as is certainly the case here, then the agency must provide a formal adjudication. Id. at 1275. Pursuant to Greene, and fundamental due process, IID hereby requests a formal adjudication with discovery and cross-examination rights, and a neutral decision-maker.

In this instance, IID believes that DOI should employ the following procedures in order to provide the required due process:

a. The schedule proposed by DOI allows IID only 30 days from its receipt of BOR's letter notification to submit relevant information to be considered under Part 417. IID believes this is insufficient time to respond to the numerous expert opinions that have been developed by BOR and others over a considerable period of time and the potentially tens of thousands of pages of backup data. IID requests that DOI extend the time for IID to review these expert reports and submit its own reports in response before having to complete its submissions to the Regional Director. Furthermore, all information as requested below will be needed by IID to conduct an objective review.

b. IID should be afforded the opportunity to conduct discovery and cross-examine adverse witnesses, including any experts whose reports, consultations or declarations are relied on or considered by DOI. This cross-examination may take the form of depositions, with the transcript of such testimony to be introduced as part of the record in connection with any findings and determination regarding IID's water use. The procedures referenced in 43 CFR 4.115 would be appropriate.

c. A transcribed hearing, with witnesses under oath, should be conducted for presentation of evidence and argument regarding the beneficial use of IID and the other California right holders. As mentioned above, that hearing would be most appropriately held before an administrative law judge utilizing the procedures set forth in 43 C.F.R. Part 4 with respect to the Board of Contract Appeals (e.g., §§ 4.107, 4.111, 4.115, 4.119, and 4.123) or

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§§ 4.220-236 regarding Bureau of Land Management appeals. Please confirm that DOI will apply these procedures in connection with the *de novo* Part 417 review.

4. Information Required by IID

It is imperative that IID immediately be provided with, or given access to, all relevant information in the possession, custody or control of DOI relevant to the beneficial use of water by each California agency. Accordingly, IID requests that prior to or at the time of its notification letter to IID regarding the commencement of the *de novo* Part 417 review process, DOI provide IID with the following information:

- a. All information in the BOR's and DOI's possession that BOR and DOI have already or will consider in evaluation of IID's, PVID's, Yuma's, CVWD's and MWD's estimated water use for 2003.
- b. All reports, drafts of reports and evidence of communications with any consultants and/or expert witnesses retained by BOR or DOI to evaluate IID's, PVID's, Yuma's, CVWD's and MWD's 2003 water use, and any other such reports, drafts and communications in BOR's or DOI's possession, even if the expert(s) were retained by someone other than BOR or DOI.
- c. All reports, drafts of reports and evidence of communications with any consultants and/or expert witnesses in connection with BOR's and DOI's prior evaluations of IID's, PVID's, Yuma's, CVWD's or MWD's water use, but excluding such documents which predate 1996.
- d. All documents evidencing or concerning communications by or among BOR, DOI, MWD and/or CVWD regarding IID's water use for 2003.
- e. All documents constituting the alleged "administrative record" for DOI's "informal adjudication" of the beneficial use decision for every California agency for 2003.

Please provide us with the above information on an expedited basis. It is essential that we promptly receive this information to afford IID a fair, meaningful opportunity to participate in a *de novo* Part 417 process.

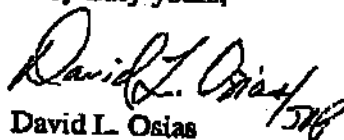
None of the foregoing is for the purpose of delaying these proceedings. However, IID will continue to demand that whatever proceedings are carried out be in compliance with due-

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process standards given the extremely valuable property rights at stake, and that the proceedings also reflect consistency of treatment and the appearance of neutrality. In order to ensure fairness and to demonstrate to all interested parties that the proposed process will result in an objective decision on the merits and within the bounds of due process, IID respectfully urges you to give very serious consideration to the requests made herein.

Very truly yours,


David L. Osias

DLO:cas

cc: Steven B. Abbott, Esq.
Linus Masouredis, Esq.
John Penn Carter, Esq.